No. 78-242

In the Supreme Court of the United States

OCTOBER TERM, 1978

LESLIE ANDERSON AND JAMES A. ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-27) is reported at 579 F. 2d 455.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1978. A petition for rehearing was denied on July 13, 1978. The petition for a writ of certiorari was filed on August 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to engage in conduct that obstructs the lawful functions of federal agencies

constitutes a conspiracy to defraud the United States, in violation of 18 U.S.C. 371.

2. Whether, in the circumstances of this case, reversal of petitioner Leslie Anderson's convictions on four counts of making false statements in violation of 18 U.S.C. 1001 required the reversal of petitioners' convictions of conspiracy to defraud the United States.

3. Whether the evidence was sufficient to warrant a jury in finding that petitioner James Anderson conspired to engage in conduct that had the intended effect of defrauding the United States and, if not, whether his conviction of violating 18 U.S.C. 371 may be sustained on evidence showing that he knowingly conspired to defraud a governmental entity and that the United States necessarily would be harmed thereby.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Petitioner Leslie Anderson was also convicted on four counts of making false or fraudulent statements, in violation of 18 U.S.C. 1001. Petitioner James Anderson was sentenced to two years' imprisonment, with six months to be served in a jail-type institution and the remainder to be served on probation. Petitioner Leslie Anderson was sentenced to two years' imprisonment. The court of appeals affirmed the convictions on the conspiracy count (Judge Henley dissenting) but reversed the convictions on the false statement counts (Pet. App. 15-27).[1]

Briefly, the evidence showed that petitioners engaged in a scheme whereby laborers whose salaries were paid under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. 801 *et seq.*, worked for petitioner James Anderson, at the direction of his father, petitioner Leslie Anderson, on two highway fencing projects. These projects received 70% of their funding from the federal government through a program administered by the Federal Highway Administration. Through petitioners' unlawful conduct, the federal government, in effect, paid for the cost of this labor twice, to the benefit of petitioner James Anderson, and the lawful functioning of both federal programs was obstructed.

As County Judge and general financial officer of Sharp County, Arkansas, petitioner Leslie Anderson obtained approval from the Arkansas Highway Department for two contracts relating to a road improvement project in the county. Both contracts were approved under a program administered by the Federal Highway Administration through the state highway department (Tr. 36-37). Under this program, the federal government pays 70% of the total cost, including labor and materials, of approved highway improvement projects, and the State or county finances the remainder (Tr. 49, 236-241).

The first contract, executed on March 4, 1975, provided for fencing work on a county road improvement project for a total projected cost of $31,118 (Tr. 37, 209). During

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[1]Although petitioner Leslie Anderson was convicted on five separate counts, the trial court simply imposed a general sentence. Because it reversed four of the five counts upon which the general sentence was imposed, the court of appeals remanded petitioner Leslie Anderson's case for resentencing on the conspiracy count (Pet. App. 24).

May and June 1975, petitioner James Anderson performed the fencing work specified in the contract (Tr. 135-136). At the direction of Judge Anderson, several county CETA workers assisted petitioner James Anderson on the fencing project, and the salaries of these employees were eventually paid by the federal government through the CETA program administered by the Arkansas Manpower Council (Tr. 256-259, 333, 354, 363, 374-375).

On June 6, 1975, the day after petitioner James Anderson had completed the work, G.A. Perrin, a friend of both petitioners, submitted the only bid on the above fencing project, a bid in the amount of $32,000 (Tr. 97, 109, 135-136). The next month, Perrin filed a claim with the county in the amount of $31,118 for the fencing work (Tr. 183). Judge Anderson approved the claim, and the county issued a check payable to Perrin for $31,118 (Tr. 183-184, 195, 197-198). Petitioner James Anderson used the proceeds of this check to purchase a certificate of deposit, to deposit money into his wife's checking account and to pay off a personal loan (Tr. 438-443).[2]

The same pattern of conduct occurred with respect to the second road improvement contract. Petitioner James Anderson performed the fencing work with the aid of CETA employees of Sharp County and through Perrin obtained compensation for the full contract estimate, $16,200, including allowable labor costs (Tr. 111, 126-127). Again, CETA employees were used on the job (Tr.

[2]After the check was issued, petitioner James Anderson took it to Perrin's place of business and persuaded his business associate, James Rose, to place a stamped endorsement, "[f]or deposit * * * Perrin & Rose Farm Supply, by G.A. Perrin," on the check (Tr. 200-201). Without any further endorsements, Anderson negotiated the check at a local bank (Tr. 438-443).

135-136). As before, petitioner James Anderson used the proceeds of the check to purchase a certificate of deposit, to deposit money into his and his wife's checking accounts, and to pay off a personal loan (Tr. 426-428).

ARGUMENT

Petitioners concede (Pet. 4) that federal funds were expended on the road improvement project submitted to the state agency by Judge Anderson, that workers whose salaries were reimbursed under CETA worked on the fencing portion of the road project, and that a straw man was used to conceal petitioner James Anderson's performance of the fencing portion of the contracts and receipt of payment for that work. Petitioners contend, however (Pet. 6-7), that this conduct does not constitute a conspiracy to defraud the United States because the cost of the road improvement project to the federal government was not thereby increased and because unemployed persons were given employment under the CETA program, as contemplated by that statute. They also attack the application of 18 U.S.C. 371 to this conduct on due process grounds (Pet. 8-9). Petitioners further contend (Pet. 2, 12) that the court of appeals erred in failing to reverse their conspiracy convictions once it had reversed petitioner Leslie Anderson's convictions of making false statements in violation of 18 U.S.C. 1001. Petitioner James Anderson additionally contends (Pet. 10) that, even assuming he had agreed to participate in a fraudulent scheme to charge a government entity for the labor of government-paid workers, he cannot properly be convicted under 18 U.S.C. 371 because the evidence did not show that he knew that *federal* funds or programs would be affected by the scheme. These claims are insubstantial.

1. The general conspiracy statute, 18 U.S.C. 371, reaches " 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.' " *Dennis* v. *United States,* 384 U.S. 855, 861 (1966) quoting *Haas* v. *Henkel,* 216 U.S. 462, 479 (1910). Accord: *United States* v. *Johnson,* 383 U.S. 169, 172 (1966). Although conspiracy to defraud the United States "means primarily to cheat the Government out of property or money, * * * it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924). It is thus unneccessary under the statute for the government to suffer an actual monetary loss. *United States* v. *Johnson, supra,* 383 U.S. at 172; *Hammerschmidt* v. *United States, supra,* 265 U.S. at 188; *United States* v. *Del Toro,* 513 F. 2d 656, 663-664 (2d Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Smith,* 496 F. 2d 185, 189 (10th Cir.), cert. denied, 419 U.S. 964 (1974); *United States* v. *Thompson,* 366 F. 2d 167, 170-173 (6th Cir.), cert. denied, 385 U.S. 973 (1966).

In the present case, petitioner James Anderson and his father conspired in a scheme that permitted James Anderson to use government-paid labor in performing fencing contracts on the road improvement project and still be paid a full contract price including labor costs. As the majority below properly found (Pet. App. 21; citations omitted), this conduct "interfered with the [federal] government's interest in 'seeing that the [road improvement] project [was] administered honestly and efficiently and without corruption and waste' ", since the federal government, through the federally-financed road improvement program, eventually paid 70% of that overstated labor cost. At the same time, this scheme thwarted the purpose and

proper functioning of the CETA program. That program was established, as the court of appeals observed (Pet. App. 21), "to provide additional funding for jobs in the public sector," and it was implemented by regulations expressly prohibiting the employment of CETA employees "in building and highway construction work * * * and [in] other work which inures primarily to the benefit of a private profit-making organization." 29 C.F.R. 96.23(b)(10).[3] By conspiring to engage in conduct that resulted in placing CETA workers in jobs that were part of a contract held by and benefiting a private-sector employer, petitioners thwarted the purpose of creating public sector jobs that would otherwise not have existed.[4]

The gravamen of petitioners' claim (Pet. 8-9) that their due process rights were violated by the application of 18 U.S.C. 371 to their conduct is not entirely clear. If they are contending that they had no "fair warning" (Pet. 9) that their conduct would constitute a conspiracy to defraud, then their claim is without merit because the jury was instructed that to convict on the conspiracy count, it had to find that petitioners "willfully" participated in the scheme "with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done" (Tr. 598-599). If petitioners are claiming that they had no fair warning that their fraudulent scheme would harm

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[3]This section remained unchanged during the period applicable in this case except that the subsection was redesignated. See 29 C.F.R. 96.23(b)(7) (1974).

[4]We disagree with the dissenting opinion below (Pet. App. 25-27) that the conspiracy charged was that the county and not a private third party was unjustly enriched by the assignment of CETA employees. The indictment charged, and the government proved at trial, that petitioner James Anderson received payments for non-existent labor costs because of the assignment of the CETA employees to work on the two fencing contracts (Count I of indictment, paras. II-IX; Tr. 589-591).

the United States and thus be punishable under 18 U.S.C. 371, then they are merely repeating the claim made by petitioner James Anderson (Pet. 10), which we answer below (pages 8-11).

2. Petitioners' claim that the reversal of petitioner Leslie Anderson's convictions on the separate counts of making false statements in violation of 18 U.S.C. 1001 requires reversal of their conspiracy convictions is based on the erroneous premise that "the alleged false statements" were "inextricably intertwined in the alleged conspiracy" (Pet. 12). The alleged false statements were certifications made on CETA reimbursement invoices by petitioner Leslie Anderson stating, *inter alia,* that no funds had been "expended" for the services of the CETA workers "under the terms of the contract agreement or grant" (Tr. 252-253). The court of appeals held that the convictions under 18 U.S.C. 1001 could not stand because the language of the required certifications was ambiguous; the court noted that, for example, the term "expended" could be interpreted as not applying to funds, like the federal highway funds, that were only "committed" at the time Leslie Anderson signed the certifications (Pet. App. 23-24). This holding obviously does not touch on the "essential nature" of the conspiracy (see *Blumenthal* v. *United States,* 332 U.S. 539, 557 (1947)), which, as noted, was to permit petitioner James Anderson to use the services of government-paid workers on the fencing contracts without paying them himself and then to receive compensation from the government for full contract costs, including labor costs not actually incurred.

3. With respect to the claim, now made only by petitioner James Anderson, that the evidence was insufficient to show an agreement to defraud the United States, as opposed to an agreement to defraud government programs not known to be federal programs, the court of appeals concluded (Pet.

App. 20) that the evidence "was sufficient to establish an agreement between the defendants to defraud some governmental entity" and that "the jury was warranted in concluding that the scheme carried out by the defendants had the intended effect of defrauding the federal government." This essentially factual determination does not warrant further review.

Even assuming, however, that the evidence was insufficient to establish that petitioner James Anderson knew that the fraudulent scheme to which he agreed would affect federal programs, his conviction under 18 U.S.C. 371 may properly stand. An agreement to defraud governmental entities other than the federal government comes within the conspiracy-to-defraud clause of 18 U.S.C. 371 where the conduct agreed upon would, if carried to completion, obstruct the proper functioning of federal programs. *Harney* v. *United States,* 306 F. 2d 523 (1st Cir.), cert. denied, 371 U.S. 911 (1962) (conspiracy to defraud Commonwealth of Massachusetts with respect to the valuation of land taken by the Commonwealth for a highway that would receive 90% of its funding from the federal government); cf. *United States* v. *Lentz,* 524 F. 2d 69, 71 (5th Cir. 1975); *United States* v. *Sabatino,* 485 F. 2d 540, 544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974).[5]

This construction of the conspiracy-to-defraud clause of 18 U.S.C. 371 is, moreover, consistent with this Court's reasoning in *United States* v. *Feola,* 420 U.S. 671 (1975),

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[5]In *Lentz* and in *Sabatino*, the courts found that the submission to a bank of a loan application containing false statements, without knowledge that the bank was insured by the Federal Deposit Insurance Corporation, was sufficient to constitute an offense under 18 U.S.C. 1014, which makes it unlawful to "knowingly" make a false statement for the purpose of influencing institutions insured by the FDIC.

with respect to the second clause of the statute, concerning conspiracies to commit an offense against the United States. The statute at issue in *Feola* was 18 U.S.C. 111, making it a crime to assault a federal officer engaged in the performance of his official duties. The Court held that 18 U.S.C. 111 required only "an intent to assault, not an intent to assault a federal officer" (420 U.S. at 684). With respect to 18 U.S.C. 371 the Court rejected both the general contention that the "conspiracy statute embodied a requirement of specific intent to violate federal law" (420 U.S. at 688) and the specific contention that a conspiracy to assault a federal officer could not be established without proof that the defendants knew the federal identity of the victim (*id.* at 692-693). The Court observed that assault was a type of conduct that would be wrongful without regard to the identity of the victim (*ibid.*) and that, accordingly, an agreement to assault persons who were, in fact, federal officers could not reasonably be treated as "less blameworthy" or "less of a danger to society solely because the participants are unaware which body of law they intend to violate" (*id.* at 694).

Here, the essential conduct—fraud—in which petitioners agreed to engage is clearly wrongful without regard to whether petitioners were defrauding the county, the State, or the United States.[6] The fact that the scheme on which

[6]Because petitioner James Anderson does not dispute the court of appeals' finding (Pet. App. 20) that he intended to defraud "some governmental entity," his position is not supported by *Ingram* v. *United States*, 360 U.S. 672 (1959), which held only that a person could not be convicted of conspiracy to evade the payment of taxes unless it were shown that he knew taxes were due (*id.* at 677-680). His citation (Pet. 10) of *United States* v. *Falcone*, 311 U.S. 205 (1940), is similarly inapposite, for as this Court noted in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709 (1943), *Falcone* "comes down merely to this, that one does not become a party to a conspiracy [to violate the Harrison Narcotic Act] by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally."

they agreed would result in harm to the United States does, however, satisfy the jurisdictional requirement, in that it ties petitioners' conduct to the pertinent "area of federal concern" (*United States* v. *Feola, supra,* 420 U.S. at 695).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Because the petition's statement of the scienter requirement of the offense at issue here is incorrect, petitioners' contention (Pet. 11-12) that the jury should have been instructed to acquit if only a specific intent to defraud "some * * * person or government" other than the United States were shown is also erroneous. *United States* v. *Guest*, 383 U.S. 745 (1966), does not support petitioners' position, for there the Court held only that, under the civil rights conspiracy statute, 18 U.S.C. 241, a specific intent to interfere with the federal right of interstate travel had to be shown, not that the jury had to find that the defendants knew interstate travel to be a federal right. Petitioners' citation of *United States* v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971), is unavailing because it relies on the holding in *United States* v. *Crimmins*, 123 F. 2d 271 (2d Cir. 1941), disapproved by this Court in *United States* v. *Feola, supra,* 420 U.S. at 688-692.

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